

Definitions of Terms, Legal Concepts, and Procedures
Found in Eminent Domain Statutes.

Prepared for the Environmental Quality Council Subcommittee on Eminent Domain
By Gordy Higgins, Research Analyst, Legislative Services Division

House Joint Resolution No. 34 (HJR 34) expresses that the use of eminent domain is not well-understood. It also urges the Environmental Quality Council (Council) to study the implementation and adequacy of Montana's eminent domain statutes. This paper is intended to address three objectives: (1) to provide definitions to commonly used terms and concepts; (2) to identify where these terms and concepts are found in the Montana Code Annotated as they relate to the exercise of eminent domain; and (3) to offer, when applicable, examples of Montana case law that govern the exercise of eminent domain. Providing definitions to many of the common terms used while discussing eminent domain will assist the Council in framing the questions raised by HJR 34 and will result in policymakers possessing consistent information to make informed decisions.

The primary definitions pertaining to legal terms or concepts have been gathered from Black's Law Dictionary. Additional sources have been used to clarify, expand, or otherwise apply the conceptual definitions to specific Montana cases or situations. In those situations, the sources have been cited. Following each of the definitions, a chapter reference has been provided. These chapters relate to the key questions raised by HJR No. 34 and provide a detailed description of how these concepts work in eminent domain cases in Montana.

Abandonment

Abandonments is the relinquishing of a right or interest with the intention of never reclaiming it.

The MCA addresses abandonment of highways and railroads, specifically:

60-1-103(1), MCA

(1) "Abandonment" means cessation of use of right-of-way or an easement or cessation of activity on the right-of-way or easement with no intention to reclaim or use again. Abandonment is sometimes called vacation.

60-11-110. Abandonment defined. For purposes of this part, "abandonment" means the relinquishment of property, both real and personal, and the discontinuance of railroad services. Abandonment may be accomplished by voluntary act or by formal procedure.

Burden of Proof

Burden of proof is a party's duty to prove a disputed charge or assertion.

Within the framework of the exercise of eminent domain, the burden of proof shifts between the condemnor and condemnee as the process proceeds. Initially, as provided in section 70-30-111, MCA, the condemnor has the duty to show by a preponderance of the evidence that the public interest requires the proposed taking.

70-30-111. Facts necessary to be found before condemnation. Before property can be taken, the plaintiff must show by a preponderance of the evidence that the public interest requires the taking based on the following findings:

- (1) that the use to which it is to be applied is a use authorized by law;
- (2) that the taking is necessary to such use;
- (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use;
- (4) that an effort to obtain the interest sought to be condemned was made by submission of a written offer and that such offer was rejected.

The burden then falls upon the one seeking to show that the taking has been excessive or arbitrary. In Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 M 235, 696 P2d 989, 42 St. Rep. 318 (1985), the trial court found that the sewer district had not shown necessity for the taking of defendants' properties because it failed to demonstrate a reasonable present need or even a need in the reasonably foreseeable future to connect defendants to the sewer system. The condemnor had not carried its burden, and the order of the trial court was affirmed.

When determining who has the burden of proof on the subject of just compensation, the Court, in State ex rel. Dept. of Highways v. Donnes, 219 M 182, 711 P2d 805, 42 St. Rep. 1938 (1985), stated that the landowner has the burden in eminent domain proceedings to prove entitlement to just compensation in excess of that offered by the condemnor.

Clear and Convincing Evidence

Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain.

This is a greater burden than preponderance of the evidence, the standard applied in most civil trials.

Condemnation

Condemnation is the determination and declaration that private property is assigned for a public use, subject to just compensation. It is also the exercise of eminent domain.

60-1-103(4), MCA

(4) "Condemnation" means taking by exercise of the right of eminent domain.

Excess Condemnation

Excess condemnation is the taking of property beyond what is needed for a public use.

Inverse Condemnation

Inverse condemnation is an action brought by a property owner for compensation against a governmental entity that has taken property without bringing formal condemnation proceedings.

Quick Condemnation (Quick Take)

Quick Condemnation or quick take is an act of taking private property for public use, whereby the estimated just compensation is placed in escrow until the actual amount of compensation can be established.

Condemnee

A condemnee is an individual or entity whose private property has been taken to satisfy a public use or public benefit.

Condemnor

A condemnor is a public or private entity that takes private property for a public use.

In Montana, the Legislature has provided specific condemnation authority to certain private entities. Section 69-13-104, MCA, grants common carrier pipelines permission to exercise eminent domain. Railroad companies have been given eminent domain powers under section 69-14-552, MCA. Section 35-18-106 (9), MCA, gives the power of eminent domain to rural cooperative utilities. (cross-reference the list of authorized private condemning entities)

Due Process

Due process is the conduct of legal proceedings according to the established rules and principles for the protection and enforcement of private rights.

The right to due process is guaranteed in the 5th and 14th amendments to the United States Constitution as well as in Article II, section 17, of the Montana Constitution. Within the general definition are two specific definitions:

Procedural Due Process

Procedural due process comprises the minimal requirements of notice and a hearing guaranteed by the due process clauses of the 5th and 14th amendments, especially if the deprivation of a significant life, liberty, or property interest may occur.

Substantive Due Process

Substantive due process is the doctrine that the due process clauses of the 5th and 14th amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective.

Easement

An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for specific limited purpose. Land benefitting from an easement is called the dominant estate. Land burdened by the easement is called the servient estate. Easements may last in perpetuity. Easements do not give the holder the right to possess, take from, improve, or sell the land.

Montana defines "easement" as:

60-1-103(10), MCA

(10) "Easement" means a right acquired by public authority to use or control property for a designated purpose.

The legal definition of dominant and servient estate is also found in Montana statutes. In this case, estate and tenement have the same meaning.

70-17-103. Dominant and servient tenement. The land to which an easement is attached is called the dominant tenement. The land upon which a burden or servitude is held is called the servient tenement.

The general rule applied to legal questions concerning the maintenance of easements states that the dominant estate or tenement is responsible for maintaining the easement.

The primarily recognized uses of easements are:

- a right-of-way;
- a right of entry for a purpose relating to the dominant estate;
- a right to the support of land and buildings;
- a right to light and air;
- a right to water;

- a right to engage in some act that would otherwise be defined as a nuisance; and
- a right to keep or place something on the servient estate.

Within the general definition of an easement, there are specific definitions that apply.

Easement in Gross

An easement in gross is an easement that benefits a particular person and not a particular piece of land. The beneficiary does not usually own any land adjoining the servient estate. This condition is most usually found in cases where an entity has acquired an easement for a public use such as a fiber-optic cable, pipeline, or electrical transmission wire.

Appurtenant Easement

An appurtenant easement is an easement that is created to benefit another tract of land, the use of the easement being incident (dependent upon or subordinate to) to the ownership of the other tract.

Eminent Domain

Eminent domain is the inherent power of the government, or an assigned agent, to take private property and convert it to public use, subject to just compensation.

60-1-103(11), MCA

(11) "Eminent domain" means the right of the state to take private property for public use.

Fair Market Value

Fair market value is the price agreed to by a willing seller and a willing buyer conducting business in an arm's-length transaction.

In Montana, the appraisal process used to determine the fair market value of property to be condemned may include the consideration of the highest and best use of the property (70-30-313 (1), MCA). This generally refers to a use that will produce the most value or profit. The best and highest use does not necessarily have to be the use in effect at the time of the appraisal.

70-30-313. Current fair market value. Current fair market value is the price that would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) the highest and best reasonably available use and its value for such use, provided current use may not be presumed to be the highest and best use;

- (2) the machinery, equipment, and fixtures forming part of the real estate taken; and
- (3) any other relevant factors as to which evidence is offered.

Fee Simple Title

Fee simple title is an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs.

Fee Simple Absolute

An estate of indefinite or potentially infinite duration. This means an interest in property that is free from any conditions or limitations.

70-15-203. Fee simple. Every estate of inheritance is a fee, and such estate, when not defeasible or conditional, is a fee simple or an absolute fee.

Just Compensation

Just compensation is the fair payment made by a condemnor for private property that it has acquired through the use of eminent domain.

Just compensation is guaranteed through the 5th amendment to the United States Constitution and Article II, section 29, of the Montana Constitution. Usually, just compensation is the fair market value of the property as appraised.

Liability

Liability is the quality or state of being legally obligated or accountable; legal responsibility to another or to society; enforceable by civil remedy or criminal punishment.

The general rule applied to legal questions concerning the liability of easement holders states that the dominant estate or tenement is liable for damage or injury to the servient estate or tenement.

Multiple Use (of Easements)

This term does not have a legal definition. The common meaning prescribed to "multiple use" is two or more activities (or public uses) sharing a common easement. It is assumed that the public uses are compatible and would not infringe upon the operation of the other.

Since "easement" is defined as a right acquired by public authority to use or control property for a designated purpose, each purpose or public use must be defined within a "multiple use easement" agreement.

Necessity or Necessary

A necessity or necessary is a thing that is indispensable (to life).

Necessaries has the broader sense of "indispensable things," whatever the subject at hand may be. The more common word means "essential." (Bryan A. Garner, A Dictionary of Modern Legal Usage. 2nd Ed.)

70-30-111. Facts necessary to be found before condemnation. Before property can be taken, the plaintiff must show by a preponderance of the evidence that the public interest requires the taking based on the following findings:

- (1) that the use to which it is to be applied is a use authorized by law;
- (2) that the taking is necessary to such use;
- (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use;
- (4) that an effort to obtain the interest sought to be condemned was made by submission of a written offer and that such offer was rejected.

Applying this definition to eminent domain, as Garner allows, suggests that the term "necessary" as used in section 70-30-111(2), MCA, could mean that "the taking is *essential, or indispensable* to such use".

However, in State ex rel. Dept. of Highways v. Standley Bros., 215 M 475, 699 P2d 60, 42 St. Rep. 563 (1985), the court stated that when the evidence presented at trial indicated that the proposed location of an improved road was the shortest, most direct, and least expensive route consistent with the design objectives, the District Court properly found that the interest sought by the Highway Department (now Department of Transportation) was necessary for the improvement. The word "necessary" in this statute does not mean an absolute or indispensable necessity but rather a reasonable, requisite, and proper means to accomplish the improvement.

In Butte, Anaconda & Pac. Ry. v. Mont. Union Ry., 16 M 504, 41 P 232 (1895), the word "necessary", as used in a statute of this character, does not mean an absolute necessity for the particular location sought but a reasonable necessity to be determined from the considerations of practicability, economy, and facilities under the particular circumstances of the case, having regard to senior rights and the benefits to the public.

Preponderance of the Evidence

Preponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is

still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

This is the burden of proof in a civil trial, in which a jury is instructed to find for the party that, on the whole, has the stronger evidence, however, slight the edge may be. (See Clear and Convincing Evidence for a contrast).

Section 70-30-111, MCA, requires that the plaintiff (condemnor) must show by a preponderance of the evidence that the public interest requires the taking.

Public Use

Public use is the public's right to use property or facilities subject to condemnation.

In Montana, and other states throughout the West, the term "public use" as it applies to eminent domain has been expanded through case law and statutory definitions to include a broader collection of ideas and public policy choices. As western states expanded to meet the needs of a larger citizenry, "use by the public" came to mean "public benefit," "public welfare," and "general welfare." Recognizing and utilizing the vast natural resources present within their borders, western states, including Montana, created conditions that allowed and encouraged a more charitable use of eminent domain in relation to the state's natural resources. While this expansion has allowed for a liberal assessment of what purposes may be public, it does not preclude the people of Montana from actually using a project that has been deemed to be a public use.

In Helena Power Transmission Co. v. Spratt, 35 M 108, 88 P 773 (1907), and Mont. Power Co. v. Bokma, 153 M 390, 457 P2d 769 (1969), the court stated that:

For condemnation purposes, "public use" is one which confers some benefit or advantage to the public; it is not confined to actual use by the public; it is measured in terms of right of public to use proposed facilities for which condemnation is sought, and, as long as the public has right of use, whether exercised by one of its members or many, a "public advantage" or "public benefit" accrues sufficiently to constitute a public use.

While property rights continue to be in need of preservation and protection, they are thought to be elastic enough to allow the promotion of a public good when landowners are justly compensated.

Reversion

Reversion is a future interest in land arising by operation of law whenever an estate owner grants to another particular estate, such as a life estate or a term of years, but does not dispose of the entire interest.

70-15-210. Reversion. A reversion is the residue of an estate left by operation of law in the grantor or his successors or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

Right of Reentry

Right of reentry is a future interest retained by a grantor after conveying a fee simple subject to a condition subsequent, so that the grantee's estate terminates (upon breach of the condition) only if the grantor exercises the right to retake it.

70-1-505. Right of reentry or repossession transferable. A right of reentry or of repossession for breach of condition subsequent can be transferred.

While under the common law, a right of reentry upon land after breach of a condition subsequently incorporated in a deed does not constitute an interest in real property and is therefore not susceptible of conveyance, under section 70-1-505, MCA, such a right may be transferred. Waddell v. School District, 79 M 432, 257 P 278 (1927).

Right-of-Way

(1) Right-of-way is: A person's legal right, established by usage or contract, to pass through property owned by another; or (2) the right to build a railroad or highway on property owned by another.

60-1-103(23), MCA

(23) "Right-of-way" is a general term denoting land, property, or any interest in land or property, usually in a strip, acquired for or devoted to highway purposes.

Sovereign Right of State

Sovereign right of state is a unique right possessed by a state or its political subdivisions that enables it to carry out its official functions for the public benefit. It also refers to a body that possesses an independent existence. A body vested with independent and supreme authority.

Vested Rights

A vested right is a right that definitively belongs to an entity and cannot be impaired or taken away without the entity's consent.

Cl2255 0003ghxb.